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Office of Administrative Law Judges
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Issue Date: 24 May 2004

Case No.: 2001-BLA-0684

BRB No.: 02-0785 BLA

In the Matter of:

JAMES AUBREY HOPPER,
Claimant

v.

PEABODY COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Before: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER ON REMAND - AWARD OF BENEFITS

On July 19, 2002, the undersigned Administrative Law Judge issued a Decision and Order in the above-entitled proceeding awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901, *et seq.*, hereinafter referred to as the Act. On appeal by the Employer, the Decision was affirmed in part and vacated in part, and the case was remanded to the Office of Administrative Law Judges by Decision and Order of the Benefits Review Board, BRB No. 02-0785 BLA, issued on August 28, 2003. The administrative file was transferred to the Office of Administrative Law Judges on November 4, 2003. Briefs have been filed by both parties and considered in this Decision.

The Findings of Fact and Conclusions of Law stated in the original Decision and Order are adopted herein except to the extent they were found to be erroneous by the Benefits Review Board, or to the extent that they are inconsistent with the findings and conclusions made in this Decision and Order on Remand.

Discussion and Applicable Law

In its Decision and Order, the Board affirmed the determination that the x-ray evidence was positive for the existence of pneumoconiosis pursuant to § 718.202(a)(1). *Hopper v. Peabody Coal Co.*, B.R.B. No. 02-0785 BLA 3 (Aug. 28, 2003). Having affirmed that the x-ray evidence established pneumoconiosis, the Board stated that the Employer's argument regarding the proper analysis of the narrative medical opinions under § 718.202(a)(4) was moot. *Id.* Having established the existence of pneumoconiosis under § 718.202, the Board affirmed the finding that the Miner was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to § 718.203(b). *Id.* at 2.

The Board held that the invalidations by Drs. Fino and Branscomb of the pulmonary function tests obtained on August 8, 2000, September 28, 2000, and December 19, 2000, were not properly addressed and weighed. The Board stated that:

> As the administrative law judge may not reject relevant evidence without explanation … we must vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(i), and remand this case for the administrative law judge to provide his reasons for either crediting or discounting the conflicting opinions regarding the validity of the pulmonary function studies of record … and determine whether the weight of the evidence is sufficient to establish total disability thereunder.

Hopper, B.R.B. No 02-0785 BLA at 4.

The Board stated that such a re-evaluation may affect the proper weight to be accorded to each physician's narrative opinion. *Id.* at 4. The Board vacated the finding that the medical opinions of record establish total disability at § 718.204(b)(2)(iv) and disability causation at § 718.204(c). Specifically, the Board held that:

> On remand, the administrative law judge is instructed to reevaluate the medical opinions of record and accord each opinion appropriate weight based on the quality and persuasiveness of its reasoning and support provided by its documentation, as well as the qualifications of the physician. … The administrative law judge must then weigh all like and unlike evidence together and determine whether the evidence supportive

> of a finding of total disability outweighs the contrary and probative evidence at Section 718.204(b). If, on remand, the administrative law judge again finds total disability established, he must provide his reasons for crediting or discounting the conflicting medical opinions of record and determine whether the weight of the evidence establishes disability causation pursuant to Section 718.204(c) ….

Hopper, B.R.B. No. 02-0785 at 4, 5.

The Claimant must establish by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his total disability. *See, e.g., Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his or her usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. Section 718.204(b)(1)(i) and (ii). Total disability can be established pursuant to one of the four standards in § 718.204(b)(2) or through the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b)(1). The presumption is not invoked here because there is no x-ray evidence of large opacities and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(c), the precursor to § 718.204(b)(2), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987).

Section 718.204(b)(2)(i) permits a finding of total disability when there are pulmonary function studies with FEV_1 values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or,
2. MVV values equal to or below listed table values; or,
3. A percentage of 55 or less when the FEV_1 test results are divided by the FVC test results.

The record contains five pulmonary function studies, the results of which are reproduced below. The factfinder must

determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and he must consider the medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.* 9 B.L.R. 1-131 (1986). More weight may be given to the observations of technicians who administered the studies than to physicians who reviewed the tracings. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). Indeed, if the Administrative Law Judge credits a consultant's opinion over one who actually observed the test, a rationale must be provided. *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990).

Pulmonary Function Studies

	Date	Ex.	Doctor	Age/Hgt.	FEV_1	MVV	FVC	Standards
1.	02/17/98	CX 1	Pope	54/69.5"	1.67	N/A	2.86	No Tracings included. coop./ comp. not noted.
2.	08/08/00	DX 11	Simpao	56/70"	1.81	64	2.93	Tracings included/ Good coop./comp.
3.	09/28/00	DX 14	Simpao	57/70"	1.33	57	2.39	Tracings included/ Good coop./comp.
4.	12/19/00	EX 1	Selby	57/70"	2.04	55	2.71	Tracings included/
				Post-Bronch.	1.40	45	2.00	coop./comp. not noted
5.	7/21/01	CX 2	Baker	57/70"	1.46	64	2.64	Tracings included/
				Post-Bronch.	1.55	56	1.75	coughing

The February 17, 1998 test administered by Dr. Pope produced nonqualifying readings. The study does not contain the required tracings nor does it list the Miner's cooperation and comprehension, which makes the test nonconforming. *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476, 1-479 (1983). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). The lack of these statements or tracings, however, does not lessen the reliability of this study. Despite any deficiency in cooperation and comprehension, the demonstrated ventilatory capacity was still above the table values. Had the Claimant understood or cooperated more fully, the test results could only have been higher. I find that the February 17, 1998, study is in substantial compliance with the quality guidelines of § 718.103, that the results of this test are entitled to some weight, and support a finding against total disability. *Crapp*, 6 B.L.R. at 1-479.

The August 8, 2000 test administered by Dr. Simpao produced qualifying readings. Dr. Simpao listed the Miner's cooperation and comprehension as good. Drs. Burki, Fino, and Branscomb found that the curve shapes produced indicated suboptimal effort and each found this study invalid (DX 12; EX 3 at 4; EX 4 at 2). Although Dr. Simpao was the administering physician for this test, I am persuaded by the combined invalidations rendered by Drs. Burki, Fino, and Branscomb. Each discussed in detail which parts of the test results showed that the Miner's effort was insufficient to produce reportable, reliable testing results. I find the August 8, 2000 pulmonary function study to be invalid, and I afford it no probative weight in a determination of total disability.

The September 28, 2000 test administered by Dr. Simpao produced qualifying results. Dr. Simpao listed the Miner's cooperation and comprehension as good. Dr. Burki found the readings produced "acceptable" (DX 15). Drs. Fino and Branscomb found quality problems (similar to those discussed above) in this study, and both physicians found the September 28, 2000 study to be invalid. I give greater weight to the physician who administered the study, *Revnack*, 7 B.L.R. 1-771, combined with the validation of Dr. Burki, over the opinions of Drs. Fino and Branscomb who reviewed the tracings at a later date. I find the September 28, 2000 pulmonary function test to be in substantial compliance with the quality guidelines of § 718.103, and I afford it great weight supporting a finding of total disability.

The December 19, 2000 test administered by Dr. Selby produced qualifying readings. Dr. Selby noted, however, that the Miner was unable to keep a tight seal on the mouthpiece. This test was reviewed by Dr. Fino who opined that the tracings revealed substantial problems in effort represented by shallow, erratic, individual breath volumes and premature termination to exhalation (EX 4, p. 4). Dr. Branscomb noted the lack of proper seal around the mouthpiece and opined that the result was likely trapped air and incomplete exhalation (EX 3, p. 4). Both Drs. Fino and Branscomb found this test invalid. Given the quality problems noted by Dr. Selby, the administering physician, and the concurring opinions of Drs. Branscomb and Fino that the tracings show that the test was invalid, I find that the December 19, 2000 pulmonary function test is invalid. For this reason, it is given no probative weight.

The July 21, 2001 test administered by Dr. Baker produced qualifying results. Dr. Baker did not note the Miner's cooperation and comprehension level, but he did note that the Miner was coughing during the study. Where the physician fails

to record the Miner's cooperation and comprehension, the test is nonconforming. *Crapp*, 6 B.L.R. at 1-479. Further, it is proper to classify a test as nonconforming where the physician stated that the miner was coughing during the test. *Clay v. Director, OWCP*, 7 B.L.R. 1-82 (1984). Given both the lack of notation of cooperation and comprehension and the coughing by the Miner during the test, I find that the July 21, 2001 pulmonary function test is not in substantial compliance with the quality guidelines of § 718.103 and, therefore, invalid. Accordingly, I afford it no probative weight.

The August 8, 2000, July 21, 2001, and December 19, 2000 pulmonary function studies have been found to be invalid and are given no probative weight. The September 28, 2000 study produced valid, qualifying values. The February 17, 1998 study produced nonqualifying values. I give greater weight to the September 2000 pulmonary study as it contained the appropriate tracings and designation of cooperation and comprehension and it is the more recent of the valid pulmonary function tests. *See Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993) (holding that more weight may be accorded to the results of a recent ventilatory study over the results of an earlier study). I find that the pulmonary function evidence supports a finding of total disability.

Total disability may be found under § 718.204(b)(2)(ii) if there are arterial blood gas studies with results equal to or less than those contained in the tables. In the July 19, 2002 Decision and Order, I found that the three arterial blood gas studies did not produce qualifying values. That finding has not been challenged, and I find that the arterial blood gas study evidence does not support a finding of total disability under § 718.204(b)(2)(ii).

There is no evidence presented, nor do the parties contend that the Claimant suffers from cor pulmonale or complicated coal workers' pneumoconiosis.

Under § 718.204(b)(2)(iv) total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work. There are seven medical narratives in the record discussing the Claimant's impairment level.

For a physician's opinion to be accorded probative value, it must be well reasoned and based upon objective medical

evidence. An opinion is reasoned when it contains underlying documentation adequate to support the physician's conclusions. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. *Id.* A brief and conclusory medical report which lacks supporting evidence may be discredited. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also, Mosely v. Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985). Further, a medical report may be rejected as unreasoned where the physician fails to explain how his findings support his diagnosis. *See Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

The Board held that the medical narrative opinions should be re-evaluated in light of the validity of the pulmonary function tests relied upon by each physician. Hopper, B.R.B. No. 02-0785 BLA at 4. It is error, however, to discredit a physician's report solely because of his or her reliance upon nonqualifying or nonconforming testing where the physician also relied upon a physical examination, work and medical histories, and symptomatology of the miner. *Baize v. Director, OWCP*, 6 B.L.R. 1-730 (1984); *Wike v. Bethlehem Mines Corp.*, 7 B.L.R. 1-593 (1984); *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984). *See also, Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997) (holding that reliance on nonqualifying pulmonary function tests along with other evidence can form the basis for a reasoned medical opinion establishing total disability under § 718.204(c)(1)).

Dr. Simpao considered pulmonary function studies (August 8, 2000 and September 28, 2000), arterial blood gas readings (showing hypoxemia), physical examination results (crepitations and expiratory wheezes), and the employment and smoking histories of the Claimant in arriving at his diagnosis that the Miner does not have the respiratory capacity to perform his usual coal mine employment. He relied, in part, on the August 8, 2000 pulmonary function study which I have found to be invalid. He also relied, in part, on the September 28, 2000 study (which I have found to be valid) and upon physical examination, histories, and arterial blood gas studies to arrive at his diagnosis of total respiratory disability. I find that the reasoned opinion of Dr. Simpao is entitled to substantial weight and supports a finding of total disability due to pneumoconiosis.

Dr. Baker, a Board-certified Internist and Pulmonologist, relied on the July 21, 2001 pulmonary function test and arterial blood gas readings showing mild to moderate hypoxemia, the

employment and smoking histories of the Claimant, and performed a physical examination. He based his finding of a "Class IV" impairment, at least partially, on the invalid pulmonary function results and opined that such an impairment "would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations."

A physician's opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) (treating physician's opinion entitled to little weight where he concluded that the miner "probably" had black lung disease); *see also, Justice v. Island Creek Coal Co.*, 11 B.L.R 1-91 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R 1-236 (1984). Dr. Baker states that a Class IV impairment "implies" that the Miner is disabled. His opinion is based partially on a pulmonary function test which I have found to be invalid. Dr. Baker also relied on histories, symptoms, physical examination, and arterial blood gas studies. While I find some shortcomings in his report, I note the other data on which he relied and find his opinion to be entitled to some weight.

Dr. Selby, a Board-certified Pulmonologist, opined that the Claimant retains the respiratory capacity to perform his usual coal mine employment. He noted a slight abnormality on his pulmonary function test and the fact that the Claimant was able to perform an "exceptional" amount of exercise on the treadmill during testing. Dr. Selby's pulmonary function test was found to be invalid. He relied upon it, however, not to prove how bad the Claimant's condition was, but rather, to opine that the small abnormality presented showed no total disability. That small deviation, coupled with normal arterial blood gas readings and Dr. Selby's observations of the Claimant during exercise, lead Dr. Selby to conclude that the Miner was not disabled. As Dr. Selby relied upon his physical observations and the arterial blood gas studies to make his diagnosis, I find his opinion to be reasoned and entitled to some weight.

Dr. Pope, a Board-certified Internist and Pulmonologist, was the Claimant's treating physician. "In black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 2003 WL 21756342 at *9 (6th Cir. July 31, 2003). "A highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinion appropriately discounted." *Id.* In addition, appropriate weight should be given as to whether the treating physician's report is well reasoned and well documented. *See Peabody Coal Co. v. Groves*,

277 F.3d 829 (6th Cir. 2002); *McClendon v. Drummond Coal Co.*, 12 B.L.R. 2-108 (11th Cir. 1988).

Dr. Pope has superior pulmonary certifications and an extended treatment history of the Claimant as envisioned in *Eastover*. Dr. Pope stated that the Miner would be unable to perform his usual coal mine duties due to chronic bronchitis and obstructive lung disease, which he opined was caused by environmental factors including welding fumes and coal mine dust. He based his diagnosis on three years of treatment and observation of the Miner (including the eight dates listed), pulmonary function studies performed in his office (February 17, 1998 study entitled to some weight) and one conducted by Dr. Selby performed on August 8, 2000 (found to be invalid), x-ray and histories. I find that Dr. Pope's opinion is well reasoned and supported by the record. I note Dr. Pope's superior qualifications and extended treatment time with the Claimant. I find that his opinion is entitled to substantial weight and supports a finding of total disability arising out of pneumoconiosis.

Dr. Maan Younes, a Board-certified Pulmonologist, was a nonexamining physician. A nonexamining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.,* 6 B.L.R. 1-1286 (1984). Dr. Younes opined that based on x-ray evidence and the severe impairment shown in the pulmonary function tests, the Miner no longer retains the respiratory capacity to perform his usual coal mine employment. The record does not reflect, however, which pulmonary function studies were relied upon to form this diagnosis. A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984). Four of the five pulmonary function studies of record have been determined to be either invalid or nonqualifying. Dr. Younes fails to document the data upon which relied. Because of this and his cursory report, I find the opinion of Dr. Younes to be undocumented, unreasoned, and entitled to little weight.

Dr. Branscomb performed a records review at the request of the Employer. He opined that the pulmonary function studies of record were invalid and thus inadequate to make a determination of impairment, but that the arterial blood gas studies showed excellent arterial saturation during exercise. He opined that the valid data presented showed no pulmonary or respiratory disability. Dr. Branscomb discounted the invalid pulmonary function studies and based his opinion generally upon the arterial blood gas studies and on the Claimant's "excellent"

readings when exercising. I find his opinion to be based on objective testing. He explained the nature and potential causes of the Miner's nondisabling respiratory problems. I find his opinion to be reasoned and entitled to some weight.

It is an error for an Administrative Law Judge to discredit a physician's opinion solely because he was a nonexamining physician. *See, e.g., Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438 (4th Cir. 1997). While I find the diagnosis of Dr. Branscomb to be reasoned and do not discredit it, I afford it less weight than the reasoned opinion of Dr. Pope, who has comparable credentials and who had multiple examinations of the Miner as treating physician over a three-year period.

Dr. Fino, a Board-certified Internist and Pulmonologist, gave a consulting report based on a review of medical records. He opined that the Claimant does not have an occupationally acquired pulmonary condition. He said the Miner is not disabled as evidenced by the normal diffusing capacity and arterial blood gas readings at rest and at exercise. Dr. Fino relied on objective testing data while avoiding the pulmonary function validity problems encountered by other physicians. It is proper, however, to accord less weight to a physician's opinion that is based on premises contrary to the Judge's findings. *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002). Dr. Fino opined that the Claimant did not suffer from pneumoconiosis or any occupational pulmonary condition which could cause pulmonary impairment, a finding that is in conflict with my previous decision and the Benefits Review Board. While I find Dr. Fino's opinion to be reasoned and documented and I afford it some weight, I afford it less weight than the opinion of Dr. Pope, the Claimant's treating physician.

After consideration of the medical reports and pulmonary function studies, I find that the opinions of Dr. Pope (the Miner's treating physician), Dr. Simpao, and Dr. Baker (some consideration) outweigh the opinions of Drs. Selby, Fino, and Branscomb. The opinion of Dr. Younes is given no weight.

I find that the medical opinion evidence supports a finding of total disability and the Claimant has established total disability due to pneumoconiosis arising out of coal mine work under § 718.204(b)(2).

Entitlement

James Aubrey Hopper, the Claimant, has established entitlement to benefits under the Act. Under 20 C.F.R.

§ 725.503(b), benefits begin with the month of onset of total disability. Based upon a review of the record, I cannot determine the onset of the Claimant's total disability. Where the evidence does not establish the month of onset, benefits begin with the month in which the claim was filed. Therefore, I find that the Claimant shall receive benefits beginning in July 2000, the month that his claim was filed.

Attorney's Fee

No award of attorney's fees for services to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for Claimant's counsel to submit an application. *Bankes v. Director*, 8 B.L.R. 2-1 (1985). The application must conform to 20 C.F.R. §§ 725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a Service Sheet showing that service has been made upon all parties, including the Claimant and the Solicitor as counsel for the Director. Parties so served shall have 20 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

It is, therefore,

ORDERED that the Employer, Peabody Coal Company, shall:

1. Pay to the Claimant, James A. Hopper, all benefits to which he is entitled under the Act, augmented by reason of his one dependent, beginning in July 2000;

2. Pay to the Claimant all medical and hospitalization benefits to which he is entitled, commencing in July 2000;

3. Pay to the Secretary of Labor reimbursement for any payment the Secretary has made to the Claimant under the Act. The Employer may reduce such amounts, as appropriate, from the amounts the Employer is ordered to pay under Paragraph 1 above; and,

4. Pay to the Secretary of Labor or to the Claimant, as appropriate, interest computed in accordance with the provision of the Act or the regulations.

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Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esq., 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.